UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SYLVIA R. RODRIGUEZ,	§	
	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION NO.**
	§	
JoANNE B. BARNHART,	§	**SA-01-CA-1101 FB (NN)**
Commissioner of the Social	§	
Security Administration,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER *GRANTING*
PLAINTIFF'S ALTERNATIVE REQUEST FOR REMAND

I. Introduction

Pursuant to 42 U.S.C. § 405(g) and § 1383(c)(3), plaintiff/claimant Sylvia Rivera Rodriguez, through her motion for summary judgment and brief in support thereto, seeks review of the October 22, 2001, administrative denial of her application for Title II Disability Insurance Benefits ("DIB").[1] Plaintiff alleges disability from a combination of physical and mental impairments, including carpal tunnel syndrome and related pain, a herniated disc in the cervical spine, and depression. The ALJ, while finding plaintiff's physical impairments were severe and precluded her from performing her past relevant work as an assembly line worker and restaurant cook, concluded plaintiff still retained the residual functional capacity to perform a significant range of light work. Some of the light-duty jobs plaintiff could allegedly perform, according to the Administrative Law Judge ("ALJ"), were: a flagger at a construction site, a bill poster, a companion for a Spanish speaking person and a hostess at a Mexican restaurant.

---

[1] Docket Entries 1 and 7.

Plaintiff contends neither the ALJ's decision concerning the non-severity of her mental impairments nor his assessment of her residual functional capacity ("RFC") are supported by substantial evidence. Specifically, plaintiff argues the ALJ erred in his decision when he found plaintiff's mental impairments, and in particular, her depression and borderline intellectual functioning, were non-severe conditions at Step Two of the sequential evaluation analysis. Plaintiff argues that had the ALJ fully considered the June 16, 2000 psychological evaluation performed by Dr. Sean Connolly, he would have concluded her mental impairments were severe enough to pose a significant limitation on plaintiff's ability to perform work-related functions. Because the ALJ failed to include plaintiff's mental impairments in his RFC analysis, and consider same in combination with plaintiff's other physical impairments, the ALJ's sequential evaluation of plaintiff's disability claim became skewed and contrary to the substantial evidence of record. Further, plaintiff contends her mental as well as physical impairments pose real questions as to her ability to obtain and maintain substantial gainful employment, particularly in the alternative jobs identified by the ALJ at Step Five of the sequential evaluation process. For these reasons, plaintiff requests the Court to reverse and remand and order the entry of a finding of disability, or, in the alternative, remand the case for proper development.[2]

Having considered the plaintiff's summary judgment brief, the defendant's brief in support of the Commissioner's decision, the transcript of the Social Security Administration (hereinafter "SSA") proceedings, the pleadings on file, the applicable case authority and relevant statutory and regulatory provisions, and the entire record in this matter, it is this Court's opinion this case should be reversed and remanded to the Commissioner for further proceedings consistent with this Order.

---

[2] Docket Entry 7.

In particular, once remanded, the Commissioner is expected to properly consider the plaintiff's mental impairments, and how these, in combination with plaintiff's physical impairments, limit her ability to obtain and maintain substantial gainful employment.

II. Jurisdiction

The court has jurisdiction under 42 U.S.C. § 405(g) and § 1383(c)(3).

III. Administrative Proceedings

According to the record in this case, plaintiff fully exhausted her administrative remedies prior to filing this action in federal court. Plaintiff filed an application for DIB benefits on October 20, 1999.[3] Plaintiff stated in her application she injured her left hand in a work-related accident occurring on July 17, 1998, and since the accident, has not engaged in substantial gainful employment.[4] Plaintiff alleges she meets the disability requirements of the Act due mainly to her pain in the neck, shoulder, wrist and lower back areas, and her depression.[5] State agency medical consultants who reviewed her claim for benefits, both initially and on reconsideration, concluded plaintiff could perform medium level work with the restriction she was limited in her capacity to perform overhead reaching with her left upper extremity.[6] Because a cook at a restaurant is considered medium level work, the state agency medical consultants determined plaintiff could still perform her past relevant work.[7]

---

[3] Administrative Transcript ("Transcript"), at 55-58.

[4] **Id.** at 64.

[5] Docket Entry 7, at (unnumbered) 2, and Transcript, at 154.

[6] Transcript, at 28-40 and 97-105.

[7] **Id.** at 40.

Plaintiff was represented by counsel at a hearing held on November 29, 2000, and she testified at the hearing through the use of a Spanish-speaking interpreter.[8] The ALJ rendered a written decision on plaintiff's claim for DIB benefits on July 27, 2001.[9] The ALJ found plaintiff had severe impairments related to status post left carpal tunnel release, status post rotator cuff repair and a herniated disc in the cervical spine.[10] The ALJ determined plaintiff had a non-severe impairment related to depression did not significantly limit her ability to work. In support of his finding with respect to plaintiff's depression, the ALJ stated:

> Although the claimant has been diagnosed with depression [...], she has never been hospitalized for depression, is not in a psychological treatment program, and takes only Paxil at bedtime to help her sleep. Therefore, the undersigned finds while the claimant has depression, it is not severe and does not significantly limit her ability to work. It causes only mild functional limitations related to her activities of daily living, social functioning, and concentration, persistence and pace. Furthermore, her depression has caused no episodes of deterioration or decompensation.[11]

The ALJ continued with his assessment of plaintiff's severe physical impairments and concluded they, either alone or in combination, did not meet or were medically equal to any listed impairment.[12] Based on his review of the medical evidence, the ALJ determined plaintiff "had the [RFC] to perform light work with the following limitations: the claimant can only read at the 2nd grade level and do math at the 4th grade level; has difficulty with English conversation; can lift and carry a

---

[8] **Id.** at 236-253.

[9] **Id.** at 15-22.

[10] **Id.** at 20 (Finding No. 3).

[11] **Id.** at 17.

[12] **Id.** at 17 and 21 (Finding No. 4).

maximum of 15 pounds; and cannot do repetitive reaching with her left upper extremity."[13] Based on plaintiff's RFC, the ALJ concluded plaintiff could not return to her past relevant work (*i.e.*, assembly line worker and restaurant cook), because work ranged in the medium level of physical exertion.[14] The ALJ also considered the plaintiff's age (46 years of age at the time of the ALJ's decision), the fact she had no transferrable skills, and had received very limited education, having only attended through the ninth grade of schooling in Mexico.[15] The ALJ referenced grid rule 202.18 as a framework for his decision-making process, but obtained vocational expert (VE) testimony at the hearing on the basis plaintiff could not perform a full range of light level work.[16]

In reviewing the VE testimony in this case, the Court notes when the ALJ first posed the hypothetical question to the VE, the VE was unable to identify any other light or even sedentary jobs would accommodate plaintiff's left hand limitations, particularly her inability to do repetitive reaching, including overhead reaching. It was not until the ALJ continued prompting the VE, to the point of suggesting the types of jobs he believed plaintiff could perform, the VE then identified some jobs at the light exertional level existing in the national and local economies which plaintiff could presumably perform. The following passages from the VE's hearing testimony illustrate this point:

> **Q. (ALJ):** Okay. Let me give you a hypothetical I would like you to assume a person who is 45 years old, who has a 9th grade education in Mexico, is only able to read at a second grade level, who's able to do math at a 4th grade level, and these are based on the psychological testing

---

[13] **Id.** at 21 (Finding No. 7).

[14] **Id.** at 21 (Finding No. 8).

[15] **Id.** at 21 (Finding Nos. 9-11).

[16] **Id.** at 19-20.

results, this person has been in the United States since age 24 so over 20 years, but has difficulty carrying on a conversation in English, so couldn't do any type of job required an extended conversation in English. And this person would be limited to lifting and carrying 15 pounds. Lifting and carrying a maximum of 15 pounds, and this person would not be able to engage in any job involved repetitive reaching with the left upper extremity. So you'd have limited ability to reach with the left upper extremity. And this person also has -- well, let's just go with, with and let me get your opinion. Are, are there any jobs with any light jobs, unskilled jobs, can be done--well let me ask you if there are any transferable skills here to other light or sedentary jobs?

A. (VE): No, Your Honor, not, not with the -- no, I don't think so. Not with the, with the restriction of the hand. No, I don't think there are.

Q. (ALJ): Okay. Can you give me examples of light unskilled jobs could be done with these limitations?

A. (VE): Well, and again, I'll repeat this, we're talking about really no repetitive use of the left, left arm at all.

Q. (ALJ): What, what I'm thinking of are jobs where [sic] are light because of standing and walking --

A. (VE): Yes.

Q. (ALJ): For example hostess in a restaurant.

A. (VE): Yes.

Q. (ALJ): Something doesn't – you might occasionally hand out the menu or something but --

A. (VE): Yeah.

Q. (ALJ): Something where you involve your, your lower extremities, standing and walking, and more limited use of your upper extremities --

A. (VE): Right.

Q. (ALJ): Umm –

A. (VE): Umm –

Q. (ALJ): Or your left upper extremity, I mean, you can, you can use it, it's --

A. (VE): Yes.

Q. (ALJ): It's just no repetitive reaching --

A. (VE): I understand. I understand. It's interesting. You know, we're talking about unskilled work because of the no transferability. Well, the hypothetical, a flagger, in a construction would fit. You could do with a single, with, with one arm. You would not -- you may occasionally be asked directions or something like , but would, would be, would be pretty infrequent. So I think would fit, it's light exertional level, and it's primarily light exertional level because it requires standing all, pretty much the entire day. And, you know, we see flaggers in around San Antonio, everywhere now. So, I, I think would fit. And would certainly fit the reading and math. I mean, there's -- I think a bill poster would fit . This would be a person would go around and just post in things like laundromats, car washes, information posters people want up. You really don't have to be able to, I mean, there's very little reading or writing would be involved in . I think would fit. I, it is interesting, I do think, given the work has been done in the past, not as far as transferability of skill or anything, but the work 's been done in the past, in restaurants, it's conceivable being a hostess or someone who seats somebody might, I mean, very well could be a possibility. You know, would be -- well, I started to say might be primarily in a Spanish speaking restaurant, but 's, well probably, would be the case, I think, because of the inability to communicate or just communicate minimally in English.[17]

In addition to the jobs of a flagger at a construction site, a bill poster, a hostess at a Spanish restaurant, the VE also mentioned the job of a companion for a Spanish speaking individual (*i.e.*, an elderly person or a child).[18] While the ALJ based his finding of no disability based on the VE's

---

[17] Id. at 260-62.

[18] Id. at 262-63.

testimony concerning the light-duty jobs plaintiff could presumably still perform[19] despite her limitations, the ALJ failed to discuss the additional testimony plaintiff's counsel was able to elicit from the VE during his cross-examination concerning plaintiff's ability to obtain and maintain long-term employment.[20] Because the plaintiff's ability to obtain and maintain long term employment in the alternative jobs identified by the ALJ has been raised in this case, the ALJ was required to address the issue.

The Appeals Council denied plaintiff's request for review on October 22, 2001, thereby making the determination of the ALJ the final decision of the Commissioner.[21] Following the Appeals Council's denial of review, this lawsuit ensued.

IV. Issue Presented

Whether the ALJ's decision is supported by substantial evidence and comports with relevant legal standards?

V. Analysis

A. Standard of Review

In reviewing the Commissioner's decision denying disability insurance benefits, the court is limited to a determination of whether substantial evidence supports the decision and whether the Commissioner applied the proper legal standards in evaluating the evidence.[22] "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable

---

[19] **Id.** at 21 (Finding No. 13).

[20] **Id.** at 264-67.

[21] **Id.** at 4-6.

[22] **Martinez v. Chater**, 64 F.3d 172, 173 (5th Cir. 1995); 42 U.S.C. §§ 405(g), 1383(c)(3) (2002).

mind might accept as adequate to support a conclusion."[23] Substantial evidence "must do more than create a suspicion of the existence of the fact to be established, but 'no substantial evidence' will be found only where there is a 'conspicuous absence of credible choices' or 'no contrary medical evidence.'"[24]

If the Commissioner's findings are supported by substantial evidence, then they are conclusive and must be affirmed.[25] In reviewing the Commissioner's findings, the court must carefully examine the entire record, but refrain from re-weighing the evidence or substituting its judgment for of the Commissioner.[26] Conflicts in the evidence and credibility assessments are for the Commissioner and not for the courts to resolve.[27] Four elements of proof are weighed by the courts in determining if substantial evidence supports the Commissioner's determination: (1) objective medical facts, (2) diagnoses and opinions of treating and examining physicians, (3) the claimant's subjective evidence of pain and disability, and (4) the claimant's age, education and work experience.[28]

1. Entitlements to Benefits

Every individual who is insured for disability insurance benefits, has not reached retirement age, has filed an application for benefits, and is under a disability is entitled to receive disability

---

[23] **Villa v. Sullivan**, 895 F.2d 1019, 1021 (5th Cir. 1990) (quoting **Hames v. Heckler**, 707 F.2d 162, 164 (5th Cir. 1983)).

[24] **Abshire v. Bowen**, 848 F.2d 638, 640 (5th Cir. 1988) (quoting **Hames**, 707 F.2d at 164).

[25] **Martinez**, 64 F.3d at 173.

[26] **Ripley v. Chater**, 67 F.3d 552, 555 (5th Cir. 1995); **Villa**, 895 F.2d at 1021 ("The court is not to reweigh the evidence, try the issues de novo, or substitute its judgment for of the Commissioner.").

[27] **Martinez**, 64 F.3d at 174.

[28] **Id.**

insurance benefits.[29] The term "disabled" or "disability" means the inability to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."[30] A claimant shall be determined to be disabled only if her physical or mental impairment or impairments are so severe she is unable to not only do her previous work, but cannot, considering her age, education, and work experience, participate in any other kind of substantial gainful work which exists in significant numbers in the national economy, regardless of whether such work exists in the area in which she lives, whether a specific job vacancy exists, or whether she would be hired if she applied for work.[31]

2. Evaluation Process and Burden of Proof

Regulations set forth by the Commissioner prescribe disability claims are to be evaluated according to a five-step process.[32] A finding a claimant is disabled or not disabled at any point in the process is conclusive and terminates the Commissioner's analysis.[33]

The first step involves determining whether the claimant is currently engaged in substantial gainful activity.[34] If so, the claimant will be found not disabled regardless of her medical condition or her age, education, or work experience.[35] The second step involves determining whether the

---

[29] 42 U.S.C. § 423(a)(1).

[30] **Id.** § 1382c(a)(3)(A).

[31] **Id.** § 1382c(a)(3)(B).

[32] 20 C.F.R. §§ 404.1520 and 416.920 (2002).

[33] **Leggett v. Chater**, 67 F.3d 558, 564 (5th Cir. 1995).

[34] 20 C.F.R. §§ 404.1520 and 416.920.

[35] **Id.**

claimant's impairment is severe.[36] If it is not severe, the claimant is deemed not disabled.[37] In the third step, the Commissioner compares the severe impairment with those on a list of specific impairments.[38] If it meets or equals a listed impairment, the claimant is deemed disabled without considering her age, education, or work experience.[39] If the impairment is not on the list, the Commissioner, in the fourth step, reviews the claimant's RFC and the demands of her past work.[40] If she is still able to do her past work, she is not disabled.[41] If she cannot perform her past work, the Commissioner moves to the fifth and final step of evaluating the claimant's ability, given her residual capacities, age, education, and work experience, to do other work.[42] If she cannot do other work, she will be found disabled. The claimant bears the burden of proof at the first four steps of the sequential analysis.[43] Once she has shown she is unable to perform her previous work, the burden shifts to the Commissioner to show there is other substantial gainful employment available the claimant is not only physically able to perform, but also, taking into account her exertional and non-exertional limitations, able to maintain for a significant period of time.[44] If the Commissioner adequately points to potential alternative employment, the burden shifts back to the claimant to prove

---

[36] **Id.**

[37] **Id.**

[38] 20 C.F.R. §§ 404.1520 and 416.920.

[39] **Id.**

[40] **Id.**

[41] **Id.**

[42] **Id.**

[43] **Leggett**, 67 F.3d at 564.

[44] **Watson v. Barnhart**, 288 F.3d 212, 217 (5th Cir. 2002).

she is unable to perform the alternative work.[45] In the case at hand, the ALJ reached his decision at step five of the sequential evaluation process.[46]

B. Is the July 27, 2001 ALJ Decision Supported by Substantial Evidence?

Plaintiff challenges the ALJ's decision on two main grounds: (1) the ALJ failed to properly consider the cumulative effect of all of the plaintiff's mental and physical impairments when evaluating the plaintiff's RFC, and (2) the ALJ's finding of no disability at Step 5 of the sequential evaluation was contrary to the substantial evidence presented.[47] Plaintiff argues these grounds constitute reversible error and substantial evidence does not support the ALJ's finding of no disability. The Court agrees.

1. The ALJ Committed Reversible Error By Failing to Consider the Combined Effect of Plaintiff's Mental and Physical Impairments When Evaluating the Plaintiff's RFC

A review of the ALJ's decision indicates the ALJ found plaintiff's depression was not severe because it did not significantly limit plaintiff's ability to work. Presumably, the ALJ reached this finding by applying the severity standard as set forth by the Fifth Circuit in **Stone v. Heckler**.[48] In addition, the ALJ summarily disregarded the plaintiff's IQ test results which showed she had borderline intellectual functioning, finding them inconsistent with other evidence of record.[49]

The ALJ's analysis concerning plaintiff's mental impairments, including her alleged low intellectual functioning, fails at two levels. First, the ALJ clearly failed to follow the **Stone** decision

---

[45] **Anderson v. Sullivan**, 887 F.2d 630, 632-33 (5th Cir. 1989).

[46] Transcript at 20-21.

[47] Docket Entry 7.

[48] 752 F.2d 1099 (5th Cir. 1985).

[49] Transcript, at 17.

by not considering the combined effect of plaintiff's mental and physical impairments in her ability to perform work-related functions. Second, the Court finds the ALJ failed to fully consider the June 16, 2000 psychological evaluation performed by Dr. Connolly. Had he done so, the ALJ would have found plaintiff's mental impairments posed more than a significant limitation in her ability to perform work-related functions.

In **Stone v. Heckler**, the Fifth Circuit was confronted with a series of cases in which the ALJ made a finding against disability at step two of the sequential evaluation process by using a literal application of the Secretary's "severity" or "significant limitation" regulation.[50] Significantly, the court pointed out the Fifth Circuit had construed the regulation as setting the following standard in determining whether a claimant's impairment was severe: "an impairment can be considered as not severe only if it is a slight abnormality [having] such minimal effect on the individual it would not be expected to interfere with the individual's ability to work, irrespective of age, education or work experience."[51] The court further explained a literal application of the regulation would be inconsistent with the Act and its legislative history.[52] Because the severity regulation defined "severe impairment," the Court admonished the Commissioner not to use the severity regulation to

---

[50] The current version of this regulation has not changed since the Fifth Circuit's consideration in **Stone** in 1985 except for the addition of the phrase "or combination of impairments," and reads:

> (c) *You must have a severe impairment.* If you do not have any impairment *or combination of impairments which significantly limits your physical or mental ability to do basic work activities*, we will find you do not have a severe impairment and are, therefore, not disabled. We will not consider age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

20 C.F.R. § 404.1520(c)(2001) (Emphasis added).

[51] **Stone**, 752 F.2d at 1101 (quoting **Estran v. Heckler**, 745 F.2d 340, 341 (5th Cir. 1984)).

[52] **Id.** at 1104-05.

systematically deny benefits to statutorily eligible claimants.[53] The Court recognized the ALJ can follow a sequential process disposes of appropriate cases at an early stage, however, they also recognized "it is impermissible to conduct the evaluation in such a manner as to deny benefits to individuals who are in fact unable to perform 'substantial gainful activity.'"[54]

Importantly, the court, in censuring misuse of the severity regulation, forewarned they would "assume the ALJ and the Appeals Council have applied an incorrect standard to the severity requirement unless the correct standard is set forth by reference to this [the **Stone**] opinion or another of the same effect, or by an express statement the construction the [Fifth Circuit] give[s] to 20 C.F.R. § 404.1520(c) is used."[55]

In the instant case, the ALJ found at step two of the sequential analysis despite plaintiff having been diagnosed with depression, this condition was not severe in it did not significantly limit her ability to work. The ALJ's rationale as expressed in his decision does not meet the requirement in order to assess severity when a claimant alleges disability from more than one medically determinable impairment, as plaintiff has done here, the ALJ is required to consider the cumulative effect of all of the impairments. In regard, the social security regulations provide :

> [i]n determining whether a claimant's physical or mental impairments are of a sufficient medical severity as could be the basis of eligibility under the Act, the ALJ is required to consider the combined effects of all impairments *without regard to whether any such impairment, if considered separately, would be of sufficient severity.*[56]

---

[53] **Stone**, 752 F.2d at 1105.

[54] **Anthony v. Sullivan**, 954 F.2d 289, 293 (5th Cir. 1992) (quoting **Stone**, 752 F.2d at 1103).

[55] **Anthony**, 954 F. 2d at 293-94; **Stone**, 752 F.2d at 1106;.

[56] **Loza v. Apfel**, 219 F.3d 378, 393 (5th Cir. 2000) (Emphasis added); **Anthony**, 954 F.2d at 293.

Here, while the ALJ determined plaintiff had severe physical impairments, namely carpal tunnel syndrome in the left hand and a herniated disc in the cervical spine, he failed to assess the cumulative impact of plaintiff's alleged physical impairments in combination with her mental limitations.

Further, this Court is of the opinion had the ALJ fully considered the June 16, 2000 psychological evaluation performed by Dr. Connolly, the ALJ would have found plaintiff's mental impairments did pose more than a minimal limitation in plaintiff's ability to perform work-related tasks. For instance, Dr. Connolly found plaintiff: (1) deficient in cognitive areas restricting training and employment opportunities; (2) deficient in reading, writing, and computational skills in both Spanish and English; (3) had difficulties in maintaining goal-directed thinking and behavior; (4) had difficulties in managing her emotions; (5) her depression detrimentally affected her initiative and motivation; (5) had difficulties in coping with stress and pressure; (6) had limited potential for academic training; (7) had limited potential for vocational training; (8) had difficulties in following written instructions in Spanish or English;[57] (9) had difficulties in learning new tasks; (10) had no vocational training or experiences; and (11) had no significant work experiences.[58] There is no question these limitations would significantly affect an individual's ability to perform work-related functions.

In addition, it is worth noting Dr. Connolly diagnosed plaintiff as suffering from a depressive disorder with psychosocial stressors, and a borderline intellectual functioning capacity (as shown by her average IQ test score of 76).[59] Dr. Connolly gave plaintiff a Global Assessment of Functioning

---

[57] The court also cites to pages 247 and 251 of the Transcript in which plaintiff showed difficulty at being able to follow the questioning during the administrative hearing.

[58] **Id.** at 153-54.

[59] **Id.** at 153.

("GAF") of fifty-five, noting severe difficulties in social and occupational training.[60] In addition, Dr. Connolly opined her "medical disability would keep her from maintaining long-term employment on a purely physical level,"[61] and "[a]ny training would have to be on the job in nature."[62] Dr. Connolly also stated the claimant appears to be in need of psychotherapy.[63] In regard, Dr. Connolly noted plaintiff's belief she cannot return to see a physician because she has no insurance and has already exhausted her workers' compensation benefits from her work-related injury.[64]

By stating plaintiff's depression did not significantly hinder plaintiff's ability to work because she has never received treatment for a mental condition, the ALJ ignored Dr. Connolly's findings and observations. Dr. Connolly's findings merited more discussion from the ALJ than what they received. Further, it should be noted Dr. Connolly's psychological evaluation was the only one of record. To the extent, as the Commissioner argues, the ALJ gave more weight to the consultative examination of Dr. Ross or the assessment of other state agency physicians, none of the evidence provided by these physicians dealt with plaintiffs mental state and intellectual functioning as Dr. Connolly's evaluation did. In order to properly discount Dr. Connolly's findings, the ALJ needed

---

[60] **Id.** at 153. The GAF is a rating intended for use by mental practitioners with respect to planning treatment and tracking the clinical progress of an individual in global terms, using a signal measure. On the GAF, the practitioner rates the patient's ability to function on a scale of 1 (the lowest rating) to 100 (superior functioning). DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDER 32, 34 (4th ed. 2000).

[61] This assessment is strengthened by plaintiff's testimony in which she stated as of the date of the hearing, she had not been medically released to return to work by her treating physician, Dr. John W.P. Horan. Transcript, at 248 and 155. There is no mention of this evidence in the ALJ's decision.

[62] **Id.** at 153.

[63] **Id.**

[64] **Id.** According to plaintiff's testimony, her workers' compensation benefits ended in May of 2000. **Id.** at 252.

to supplement the record by obtaining a second evaluation from a different psychologist. This, the ALJ failed to do. In fact, when asked by the ALJ at the hearing whether she was receiving psychiatric treatment for her depression, plaintiff responded in the affirmative and even provided the name of the general practitioner providing the treatment.[65] There is no indication the ALJ ever contacted this physician for proof of treatment.[66] Further, the plaintiff stated at the hearing while a functional capacity assessment was scheduled to be conducted, none had been performed at the time of the hearing.[67] An ALJ has the responsibility to "'develop the facts fully and fairly relating to the applicant's claim,'" and, if he does not meet this responsibility, his decision is not "'substantially justified.'"[68] For these reasons, the ALJ's findings concerning plaintiff's alleged mental limitations are erroneous and warrant reversal.

As a related issue, plaintiff also contends the ALJ erred in determining plaintiff's RFC when he failed to take into consideration plaintiff's mental limitations.[69] The ALJ found plaintiff had a RFC "to perform light work with the following restrictions: the claimant can only read at the 2nd grade level and do math at the 4th grade level; has difficulty with English conversation; can lift and carry a maximum of 15 pounds; and cannot do repetitive reaching with her left upper extremity."[70] Because the ALJ's RFC analysis did not take into consideration plaintiff's psychological or mental

---

[65] **Id.** at 252.

[66] **Id.** at 252.

[67] **Id.**

[68] **Boyd v. Apfel**, 239 F.3d 698, 708 (5th Cir. 2001) (quoting **Ripley**, 67 F.3d at 557).

[69] Docket Entry 7, Section V, Entitled "Part Two of the Argument."

[70] Transcript, at 21 (Finding No. 7).

limitations (as noted in Dr. Connolly's evaluation), based on his unsupported finding at step two of the sequential evaluation process these limitations were not severe, his RFC assessment must be revisited for the reasons already discussed.

The Social Security regulations and rulings provide guidance for the ALJ in determining a claimant's RFC.[71] Specifically, the regulations provide RFC is "an assessment based upon all of the relevant evidence."[72] In addition, SSR 96-8p provides the ALJ "must consider all allegations of physical and mental limitations or restrictions and make every reasonable effort to ensure the file contains sufficient evidence to assess the RFC." The RFC assessment must always consider and address all medical source opinions.[73] SSR 96-8p also states an ALJ's assessment of claimant's RFC must contain a "thorough discussion of the objective medical evidence, including the individual's complaints of pain and other symptoms,"[74] as well as discuss how "any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved."[75]

Here, because the ALJ failed to properly assess the severity of plaintiff's non-exertional impairment(s) according to the applicable legal standards, his assessment of plaintiff's RFC became skewed and was contrary to the substantial evidence.[76] Accordingly, due to the ALJ's errors in failing to consider the record as a whole throughout his decision, and in particular Dr. Connolly's

---

[71] **See** 20 C.F.R. §§ 404.1545, 416.945; and SSR 96-8p.

[72] 20 C.F.R. § 404.1545 (Emphasis added).

[73] SSR 96-8p.

[74] **Id.**

[75] **Id.**

[76] **See** 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. §§ 404.1520 and 404.1561.

psychological evaluation, the Court finds the ALJ's determination of plaintiff's RFC was erroneous and not supported by substantial evidence.

2. The ALJ Committed Reversible Error at Step Five of the Sequential Evaluation Analysis

The ALJ made his finding of no disability at Step Five of the sequential evaluation process. At this step, the burden shifted to the ALJ to show there is other substantial gainful employment available the claimant is not only physically able to perform, but also taking into account her exertional and non-exertional limitations able to maintain for a significant period of time.[77] If the ALJ adequately points to potential alternative employment, the burden shifts back to the claimant to prove she is unable to perform the alternative work.[78] The Court finds the ALJ erred at this step of the process, and such errors necessitate reversal in this case.

Based on the testimony of the VE quoted earlier in this Order, it appears the ALJ, not the VE, was the one testifying as to the jobs plaintiff could still perform.[79] This was an improper use of the VE testimony. Testimony quoted earlier in this opinion reveals the VE, in reviewing plaintiff's vocational and education background, was unable to find any skills would transfer to the light work. More importantly, in responding to the ALJ's hypothetical, the VE seemed hard-pressed to identify alternative employment in his expert opinion plaintiff was able to perform based on her RFC. It is evident the ALJ then proceeded to lead the VE's testimony in attempting to find alternative jobs which plaintiff could perform. Consequently, the ALJ's handling of the VE's testimony was improper and warrants reconsideration.

---

[77] **Watson**, 288 F.3d at 217.

[78] **Anderson**, 887 F.2d at 632-33.

[79] **See** pages 6-7, **supra**.

Further, once the ALJ and the VE were in agreement plaintiff could presumably perform the jobs of a flagger at a construction site, a bill poster, a hostess at a Mexican restaurant and a companion for a Spanish speaking individual, plaintiff's attorney, during his cross-examination of the VE, cast serious doubts as to plaintiff's ability to maintain employment and properly perform in those jobs.[80]

For instance, plaintiff's counsel elicited plaintiff's performance as a flagger could become problematic because according to her RFC as determined by the ALJ she is precluded from performing a job requires repetitive reaching and movements of her upper left extremity.[81] This limitation in essence would compel her to use her right arm the entire time, increasing the likelihood she could become fatigued or otherwise attempt to switch arms.[82] Significantly, the VE admitted during cross-examination, plaintiff would also encounter problems at performing this job if she was frequently asked directions by the public or was simply asked what was going on in the area or how long the delay would last.[83] The ALJ failed to discuss this portion of the VE's testimony in his decision. This evidence raises serious questions as to the plaintiff's ability to perform in the capacity of a flagger.

With respect to the job of a companion, the VE again conceded during his cross- examination plaintiff's ability to perform in capacity would be compromised if she was required to lift or carry

---

[80] **Id.** at 264-67.

[81] Docket Entry 7, at (unnumbered) 5; and Transcript, at 260.

[82] **Id.**

[83] Transcript, at 266.

the person who was under her care, or if the person fell and needed assistance to get back up.[84] Further, plaintiff's attorney used the hearing testimony concerning plaintiff's difficulties in buttoning her clothes and getting herself dressed to cross-examine the VE.[85] In regard, the VE acknowledged this limitation could be problematic for someone employed as a companion who may be expected to provide grooming assistance to the person under her care.[86] Also, while not discussed in the record, plaintiff's inability to understand the English language may become an issue if she were required to dispense prescribed medication to the person under her care, or if in an emergency situation, she needed to contact law enforcement or health care personnel.

Likewise, the VE stated on cross-examination plaintiff would encounter difficulties at performing in the capacity of a bill poster due to her limitations at being able to reach overhead and perform repetitive tasks (*i.e.*, hammering the posters unto walls, street poles, etc.,) with her upper extremities, particularly her left side.[87] Further, Dr. Connolly's observation concerning her limitations at following instructions, whether in Spanish or English, could become a real obstacle to her ability to properly perform in this position.[88]

With respect to the position of a hostess at a Mexican restaurant, the plaintiff in her summary judgment brief argues "hostesses are occasionally pressed into service cleaning or assisting other workers during busy hours. This she would not be able to do."[89] Indeed, Dr. Connolly's

---

[84] **Id.** at 265.

[85] **Id.** at 250 and 265.

[86] **Id.** at 265.

[87] **Id.** at 266.

[88] **Id.** at 150-51.

[89] Docket Entry 7, at (unnumbered) 6.

observations plaintiff had difficulties coping with stress and pressure would appear significant to plaintiff's ability to perform in this position, since as plaintiff argues, "most restaurants become hectic at critical times, [and thus] the claimant would not be able to perform her job as a hostess."[90] Because the ALJ ignored the evidence concerning plaintiff's ability to meet her burden of proving she was not able to obtain and maintain long-term employment in the alternative jobs identified by the VE, the ALJ's findings must be reversed because they are contrary to the substantial evidence of record.[91]

VI. Conclusion

For the foregoing reasons, the Court hereby **REVERSES** the Commissioner's decision and **GRANTS** plaintiff's alternative motion (Docket Entry 7) to **REMAND** this case for a rehearing before the ALJ for further proceedings, pursuant to sentence four of 42 U.S.C. § 405(g).[92] The Commissioner's adoption of the ALJ's finding of no disability in this case should be **REVERSED** because it is not based on substantial evidence and it is not a correct application of the relevant legal standards.

Specifically, this case should be remanded so the ALJ can analyze the severity of plaintiff's mental impairments and, according to the **Stone** decision, assess the cumulative effect plaintiff's non-exertional and exertional impairments have on plaintiff's ability to obtain and maintain substantial gainful employment. 20 C.F.R. § 1520(c). The ALJ should also consider and weigh all

---

[90] Transcript, at 154, and Docket Entry 7, at (unnumbered) 6.

[91] **See Watson**, 288 F.3d at 215 (where Court remanded case on basis the ALJ failed to consider whether claimant was capable of maintaining as well as obtaining employment before finding no disability); **Singletary v. Bowen**, 798 F.2d 818 (5th Cir. 1986).

[92] **See Istre v. Apfel**, 208 F.3d 517, 519-21 (5th Cir. 2000).

the medical opinions of record in accordance with 20 C.F.R. § 416.927(b) & (f)(2) and SSR 96-6p. The ALJ also should assess plaintiff's physical and mental residual functional capacity consistent with the medical evidence of record and the regulations. 20 C.F.R. §§ 404.1520a, 404.1545, 404.1567, 416.920(a), 416.945 and 416.967.

Upon remand, the Court suggests the Commissioner fully consider the need to further develop the plaintiff's medical record by performing a neuropsychological examination and a new psychological evaluation with an IQ test. It is the opinion of this Court these additional tests are relevant in light of the medical evidence gathered at the administrative hearing which suggests the possibility plaintiff may suffer from borderline intellectual functioning.

It is so ORDERED.

SIGNED this 21st day of March, 2003.

FRED BIERY
UNITED STATES DISTRICT JUDGE